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# The Dynamics of Law and Conventions

Christian Bessy\*

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**Abstract:** »Die Dynamik von Recht und Konventionen«. In this contribution, an endogenous conception of law is defended which can be deployed in regard of different scales of time and domains of the law. In this article, the focus is mainly on labor law. In the first part, a history of the French employment contract law is presented by proposing a grid of its foundations and evolution from the distinction of different principles of justice generating conventions. The change of conventions and its impact on law is precisely treated. In a second part, the recent evolution of this law will be exposed by showing the key role played by legal intermediaries in the contractualization of the working relationship, based on a database of employment contracts. It is shown how lawyers can generate an increasing strategic use of law, disconnected from territorialized conventions, if they do not play their role of mediator between different logics. In the conclusion, the emergence of a transnational law and the transformation of the lawyer profession are questioned.

**Keywords:** Institutions, law, conventions, intermediaries.

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## 1. Introduction

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Economics of convention (EC) has integrated the analysis of legal rules alongside other approaches which are interested in the way institutions are structuring economic exchanges and which avoid different forms of functionalism – thus differing with approaches searching for optimal institutions or for the minimization of transaction costs (Salais 1998; Bessy and Favereau 2003). From this standpoint, EC has followed the work of the early American institutionalists who were highly influenced by the pragmatist philosophy (Commons 1934). But EC has also been in search for the continuity between economics (and sociology) and law because of its interest in operations of “qualification” (of entities that make reference to a set of rules). These operations are present in juridical judgments as well as in legitimate judgments (Thévenot 1992, 2012). EC has also been interested in studying the game of interpretation of (incomplete) legal rules with reference to conventions and a pluralist theory of justice (Ricoeur 1995).

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This integration results initially from EC's empirical interest for public policies, especially in the field of employment and from the interest in the ways they are evaluated (Salais et al. 1999; Bessy et al. 1995). Therefore, EC has developed a whole methodology for the analysis of law, of the genesis of juridical categories (lawsuits, public debates and forms of knowledge which have preceded them),<sup>1</sup> and of the usage actors make of law in various situations, thereby examining the different juridical doctrines as well as their relations to economic arguments. In particular, we pointed out a convergence when economic analysis considers authority as an organizing principal (Bessy and Eyraud-Duvernay 1995). Without underestimating the incentive strength of law, and as a result, accept a minimum of consequentialism (cause-effect relation), EC takes into account the way by which the law is built and makes sense, and the resources that are mobilized. Instead of considering the legal rule as a mechanism, or reducing it to its enunciation, it is necessary not only to take into account the case-law interpretations, but also to study how these interpretations are adjusted progressively by the legal professionals according to the specificities of productive configurations and the conventions which are at work.

Thus, this methodology has always contained an historical point of view so as to better understand the invention and the stabilization of legal categories.<sup>2</sup> As a result, the institutionalization process – its normative power – does not only depend on the political energy or the particular will of a government, nor on the promotion of a good balance between different concerns, but also on the decentralized search of cooperative solutions, combining cognitive frameworks and the political construction of interests. We can therefore consider institutionalization, and in particular the regulative power of law, as an interactive process between legal texts and cooperative solutions or conventions elaborated by actors themselves at the micro level (for their coordination), process in which different kinds of “legal intermediaries” play an important role (De Munck 2006; Bessy et al. 2011).

Following this endogenous conception of law, the work of Cottureau (2002) on the role played by local jurisdictions (like the French *Conseil des Prud'hommes*) in defining the “bon droit” gives a striking illustration of our argument. The author describes the role of the “bon droit” in the normative life of occupations in the 19th century, a role difficult to imagine nowadays considering our current representations of the function of labor law. But this concept was common in the 19th century and was opposed to the (formal) law, stretch-

<sup>1</sup> As we show in Bessy (2012a), these debates lie on the anterior constitution of different kinds of associations, collective bodies elaborating critical arguments, political claims, cognitive artefacts such as statistics, categories, and definitions of products or technological process.

<sup>2</sup> The “Dictionnaire historique de l'économie-droit” of Alessandro Stanziani (2007) constitutes a systematic exploitation of this perspective extended to all the legal categories that have a link with economic activities.

ing on two poles *legitimate* legality and *textual* legality. The invocation of the “*bon droit*” led to a critical requirement of legitimacy on the part of citizens questioning the legality on its well-foundedness.

But outside of these spaces of collective bargaining around work rules, based on relations of delegation of employers and employees, we can regard all the ‘public spaces’ as being subject to a requirement of justification. In these public spaces, contradictorily different ways to evaluate the work and distribute roles and rights are discussed and weighed. Among the entities that introduce mediations between the principles of justice and ordinary judicial judgments, one can also consider today an increasing number of professionals (lawyers, arbitrators, mediators, in-house lawyers, professional associations or advocacy groups) who develop legal expertise. They occupy a privileged position in the articulation of different logics of actions in their everyday practices, and contribute to define what law is, but sometimes they increase its formal character by making it a very strategic resource.

Indeed, these intermediaries provide relevant information upstream and downstream of the development of legal provisions or judicial decision. By implementing principles of justice in cognitive and practical devices, they allow the law to have a certain effectiveness in exercising its regulatory function instead of relying on the sole will of governments or the intervention of judges. This leads to a vision of law limited to “macro” actors and a legal rule regarded as a pure incentive scheme binding optimal behaviors and defined by experts who would have a perfect understanding of the social world.

Such an endogenous conception of law can be deployed in regard to different scales of time and domains of the law. In this contribution, we will focus mainly on labor law. In the first part, we present a history of the French employment contract law by proposing a grid of its foundations and evolution from the distinction of different principles of justice.<sup>3</sup> We treat precisely the change of conventions and its impact on law. In a second part, we will expose the recent evolution of this law by showing the key role played by legal intermediaries in the contractualization of the working relationship, based on a database of employment contracts. We show how lawyers can generate an increasing strategic use of law, disconnected from territorialized conventions, if they do not play their role of mediator. In conclusion, we will question the emergence of a transnational law and the transformation of the lawyer profession.

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<sup>3</sup> As we show in Bessy and Favereau (2003), in regards to Ricoeur (1995), this is one of the basic functions of the law to decide between different types of rules, prioritize different types of social goods at any given time.

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## 2. The Long-Term Dynamic of Conventions and Law

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As a first step, building on the model of the “Economies of worth” (Boltanski and Thévenot 2006),<sup>4</sup> we can distinguish different types of conventions, or implicit relationship patterns, which founded the French labor law. We propose that the rationale and the codification of this law were based on these justified conventions that did not evacuate the struggle of interests and the logic of balance of powers in their genesis. This enables us to account for the plurality of the principles of justification within the French employment contract law. In a second sub-section, we will examine the issue of the emergence of new conventions that shape new practices which can be or not consolidated by the law, following a dynamic already described by Commons (1934).

### 2.1 The Justified Models of French Labor Law

A good starting point among others (Didry 2012), is the argumentation developed by Cottureau (2002) in which he examines the transformation of the “labor law” on the occasion of the “railway officers” issue (which gave rise to the first law on dismissal in December 27, 1890) and of work accidents (1898 law). Among the explanatory elements of this transformation, the author presents the invention of the notion of “employment contract” at the turn of 19th and 20th century, as a doctrinal claim instituting the relationship of hierarchical subordination as founding legal category of this concept. It questions one hundred years of jurisprudence that sought to correct the social practices likely to reproduce relations of servitude. Instead of the scheme of equity based on the requirement of genuinely reciprocal consents, as in the case of the “job contract” (*contrat de louage d’ouvrage*), the logic of servitude resurfaced and became widespread.

We can extend the history of labor law proposed by Cottureau by highlighting other principles of justification of the law allowing to get out of the only confrontation, typical of the 19th century, between household dependency links (domestic order of worth) and market mechanisms for working-class emancipation (market order of worth).<sup>5</sup> Hence, “civic principles” (in the meaning of

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<sup>4</sup> In their model of justification, Boltanski and Thévenot (2006) advance the main idea that coordination and evaluation involve “justification”: that is to say what is good and just in a certain “world” (“cité” in French). From this perspective, the notion of “convention” refers to the definition (shared representation) of the common good, being given a plurality of fair principles allowing judging (and ranking) people and things. It leads to consider more explicitly both the cognitive and deontic (if not political) aspects of conventions, although certain conventions have the pure practical aspect of reducing the costs of coordination.

<sup>5</sup> This tension between these two orders of worth has been particularly studied by Chateauraynaud (1991) in his analysis of the institutionalization of the staff regulations (*règlement intérieur*) at the turn of the 19th and 20th century. Following the work of Cottureau on *Conseil des Prud’hommes*, but also the model of Economies of worth of Boltanski and

Boltanski and Thévenot 2006) will give justification to collective branch agreements based on a new form of solidarity and expression of the collective interests of workers (and employers). The reference to an “industrial order” will justify the establishment of a set of standards for occupational health and safety at work, as well as social insurance based on the concept of “professional risk”, “lump sum liability” and associated cognitive devices (accounting, statistics).<sup>6</sup>

From a historical perspective, it is a compromise between these two orders of worth (Boltanski and Thévenot speak of a “civico-industrial” compromise) that can explain the development of labor legislation from the interwar period until the 1980s. Labor relations are primarily governed by a collective status negotiated and based on employment stability. This worker protection in reference to collective status (Camerlinck 1958) is a qualification based on the “post of work” (*poste de travail*) it occupies, and is a peculiarity of the French labor law relatively to other countries (Marsden 1999). As a consequence, this third model puts other equity schemes in the background, but the latter does not disappear completely. The concept of hierarchical subordination is always at the core of the jurisprudential definition of the notion of “employment contract.”

Apart from this *longue-durée* historical perspective, seeking to highlight a dominant pattern of equity retained by labor law, it is important to keep in mind the plurality of the legitimate foundations of contemporary labor law and its plasticity, which was already present in the Civil Code as early as in the 19th century (Bessy 1993). It is this plasticity of the law that can meet the legitimate claims of actors in the employment relationship and ensure continuity between business rules, professional practices, and positive law. This leads to consider the “enterprise link” (*Lien d'entreprise*), besides the contractual relationship between the employer and the employee, as embedded in a broader social link, and to give a horizon of justice and political commitments made by all members of the company. This “political economy of the firm” (Eymard-Duvernay 2004) contrasts with the neo-institutional approach that views the firm as a “nexus of contracts” (Williamson 1985).<sup>7</sup>

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Thévenot (2006), the author shows how the legal controversies concerning the issue of responsibility (at the occasion of lawsuits) are crucial moments in which conventions become more explicit and several horizons of meaning are confronted.

<sup>6</sup> Concerning the plurality of “labour conventions” during the French interwar period, see the work of Didry (2002) on the genesis of collective agreements of the Popular Front.

<sup>7</sup> However, from a theoretical perspective, it is important to take into consideration the critique Williamson addresses to the “legal centralism.” Its too formal character inhibits an adequate regulation of labour relations which are characterized by uncertainty and which are an engagement in idiosyncratic links. He tries to demonstrate the superiority of a legal model fundamentally based on the private ordering and therefore on a form of self-regulation based on collective bargaining or more informal rules in enterprises. He defends a kind of “legal pluralism” in which lawsuits constitute an institutionalized way of disputes resolution, at once the informal rules or conventions at work are breached. In this aspect Williamson’s approach converges with EC.

A similar analysis can be used in the study of “The invention of unemployment” following the one conducted by Salais et al. (1999). Along this vein, the historical study of the categorization of unemployment in Germany proposed by Zimmermann (2001) is particularly interesting, as it manages to articulate long-term (*longue durée*) and short-term variations. Over the long period (from the end of the 19th century until the Second World War), she describes the gradual emergence of the institution of unemployment and its stabilization by virtue of the creation of a new form of State, a new civic link, conferring rights of compensation to all unemployed people (including manual workers). The variation of criteria of definition and compensation of the unemployed during this period ultimately obeys different conventions depending on the nature of the “common good” on which they are based.

Following this perspective, the convention concept referring to a principle of justice would have a more situated feature in the sense that it would base the agreement on the definition of the qualifications of the unemployed, in particular spatio-temporal space. The agreement on the principle of compensation for involuntary unemployment is not actually changed and constitutes the heart of the institution. This kind of historical analysis accounts for the plastic nature of labour law following the conventions at stake in different contexts, and in particular the degree of industrialization in different regions (Salais et al. 1999).

## 2.2 The Emergence of New Conventions and their Impact on Law

From an analytical point of view, the emergence of new conventions which can gradually modify the interpretation of current law or create new legal rules still has to be understood. Indeed, some historians have raised criticisms over the lack of historical construction of the “orders of worth.”

We can thus understand how the historical analysis conducted by Boltanski and Chiapello (2007) led them to focus on the institutionalization of the tests of justice (*épreuves de justice*), “collective” and cognitive devices associated with the establishment of a new “connectionist” order of worth.<sup>8</sup>

The movement described is, during the contemporary period, the question of categorizations imposed during the previous phase of capitalism based on intense collective bargaining at different levels. This social movement is largely driven by the State and allows the organization of long careers and the regulation of income distribution. This challenge that the authors refer to as a “civico-industrial compromise,” is explained by the individualization of the employment relationship. This individualization finds its roots in the criticism of the 1970s based on the rhetoric of independence and responsibility at work, and the rigidity of rules and the bureaucratic shackles of large organizations and ad-

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<sup>8</sup> On this issue see also the work of Lafaye et al. (2011) on the genesis of a possible “green worth.”

ministration. These social (and artist) criticisms against the hierarchical situation are going to impulse the premises of the development of the “city by projects” in which justified action is based on the permanent redeployment of resources and the transferability of skills. This management reform relies on the developing techniques of information and communication and the emergence of a new convention of equivalence in terms of information.

However, Boltanski and Chiapello (1999) stress that the requests for flexibility weaken the foundation of a true city because of the difficulty to implement institutionalized tests (*épreuves instituées*) that build on categorizations prior to conventional codifications of the social world. They are thus lead to the observation of a certain institutional deficit following the withdrawal of the intervention of the State. As Diaz-Bone (2012) shows in his analysis of the co-evolution of conventions and institutions, this situation of incoherence is in principle transitory. This transition contributes to the growth of inequalities partially provoked by strategic uses of current law, in particular from the part of employers that have a strong bargaining power on the labor market. In this sense, Boltanski and Chiapello advance that (justified) “criticism” is not the only engine of the evolution of institutions and that we must take into account diffuse relations of power or domination.

But we can also acknowledge that this new connectionist convention has widely inspired the development of individual rights. Following this perspective, our work on hiring practices shows how the convention of individualization (proper to a connectionist order) tends to de-contextualize the evaluation of competencies, which are detached from a precise occupational context, and to valorize the most general capabilities so that competencies are seen as belonging to isolated individuals (Bessy et al. 2001). This logic of individualization of competency is reinforced by public policies that consider young people and the unemployed as individual subjects who enter into contracts with “producers” of training to improve their “human capital.” Evaluation and occupational guidance tools, including the nomenclature of occupations and professional qualifications, attest to a conception of competencies defined outside of any professional context, thus favoring a purely functional approach to work, training and recruitment. Individual subjects become more and more responsible for their training<sup>9</sup> and their performance.<sup>10</sup>

We are now going to present a second illustration of this dynamic between conventions and law with the example of the contractualization of employment relationship.

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<sup>9</sup> Such a process of individualization is also activated by the development of “individual training rights” and the implementation of different credit saving formula.

<sup>10</sup> On this issue, see the work of Lejeune (2013) showing the diffusion of this convention in banking industry with the development of individual pay schemes.



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### 3. The Contractualization of the Employment Relationship: Advances and Limits

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Many studies have shown the diversity of the employment relationship in relation to a wide range of formal and informal institutions (Petit 2003). On our side, we have revealed the plurality of conventions and uses of law since a statistical study on the clauses of the contracts of employment (Bessy 2007).<sup>11</sup> Our typology underlines the plasticity of French labor law and the different principles of justice which ground it. These principles are mobilized by the actors, concretized by legal devices, like the written contract, in order to make the law effective, in particular protecting employees while insuring efficiency to firms' productive activity.

Beyond the diversity of the employment relationship, our data set of employment contracts shows diachronically the extent to which the 'revival of the contract' during the turn of the 1980s and 1990s was both the product and the factor of the employment relationships evolution. These relationships are more and more marked, although to different degrees, by a legalization process which relies on the development of the contract considered both as a 'human resources management' device and a legal category serving to interpret and solve conflicts at work. It is what we call "contractualization" (Lyon Caen 1988; Jeammaud 1989).

This evolution can be considered as social progress. Moreover, it is in line with the European employment policy objectives concerning the information and the consultation of employee at individual level (1991 Directive). The notion of "contractualization" is perhaps too strong for expressing an increasing formalism responding to the employers' obligation to provide employees with a written statement of their main conditions of employment, or a procedural individualization in the sense that collective agreements are no longer the main source for the definition of employments conditions. In doing so, we take on the risk of forgetting the proper commitment of the parties concerning specific provisions such as the trial period or the covenant non-to-compete. In this way, the contractual terms are independent of any change brought by collective agreements. Besides, it may seem curious to use the term "contractualization"

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<sup>11</sup> The database consists of a total of 403 contracts, 86% of them signed between 1993 and 2004, which come from over 300 firms in various sectors. The data on the characteristics of the firm and the job are also available. The content of the text of the contract, that to varying degrees crystallizes a learning process related to prior disputes, can then be considered as a source of information on the rules framing the employment relationship or, at least, the rules in relation to which the parties seek guarantees of one kind or another. As a result, the part of what parties can bargain, the weight of the different formal and informal obligations can be variable according to the conceptions of employment relationships, the collective references which support the cooperation between the actors when they are not engaged in a pure relation of power.

for provisions through which the employer increases his power of decision-making and for which the employee does not have any other opportunity than to accept the terms because of his weak position. It would be better to speak, on the contrary, of “decontractualization.” We are here faced with all the ambiguity inherent in the notion of “contract.”

Even if this contractualization process is limited to certain configurations, it would be as so much social progress as it does not increase litigation. Indeed, since the beginning of the 1990s, the statistics about the disputes settled through employment tribunals (*Conseil des prudh'hommes*) show certain regularity and even a slight decrease: from 224,158 demands in 1993 to 207,770 in 2004. Around 95% of the settlements concern dismissals.

On the contrary, the appeals (*appels*) on employment tribunals decisions have slightly increased (from 13.9% to 18.8% during the same period); *idem* in the case of the labor division of the high court (*Pourvois en Cassation*) (Munoz Perez and Serverin 2005). These evolutions highlight a more intense recourse to formal law, and more costly disputes resolution mechanisms, which may lead to a strategic use of law. In adopting such an approach, legal professionals no longer play a mediation role but risk reinforcing the gap between formal law and *bon droit* (Cottureau 2002).

### 3.1 The Mediation of Lawyers

This leads us to reflect upon labor law reforms by considering professional constraints on “intermediaries of law” and the legal services market in which they operate (Bessy 2012b). Following Edelman (2003),<sup>12</sup> lawyers make changes in the law and the new risks run by organizations because of patterns of litigation known. They write on websites or in professional newspapers and give training courses to other lawyers and managers, which are so many means to increase the reputation of lawyers. They may also work as consultants for non-specialized lawyers, especially for in-house legal counsel within organizations. In doing so, they maintain very close links with both corporate management and other management consulting firms.

This activity makes it possible to single out “models” of compliance with the law and to better assess the possibilities of a lawsuit and the responsibility of companies. In this respect, they can exaggerate the threats (sources of legal

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<sup>12</sup> One refers here to the approach of this American sociologist of law who defends an endogenous notion of law. She shows how the practice of law professionals, concerning civil rights as regards employment in the United States, fits in with a double process of “managerialization” of the law and “legalization” of organizations at the crossroads between the legal and organizational fields. Because of the abstract and ambiguous character of these civil rights, lawyers in particular, by means of their consulting activity, collectively build models of compliance with the law that integrate organizations’ objectives of efficiency and profitability.

insecurity) represented by the law, in order to enhance their power and their status within the companies, in particular in matter of dismissals.

Our proper work shows that the strategic use of law can also be active at the moment of drafting the employment contract by legal professionals (Bessy 2007). The diachronic treatment of our data sets of employment contracts illustrates a dynamical interaction between contractual practices and the jurisprudence.

### 3.2 Instrumentalization of Law and Relations of Power

During the 1990s, the increasing implementation of ‘flexibility clauses’ that respond to the jurisprudential transformation concerning the amendment of the contract gives us a good illustration.<sup>13</sup> This growth is not only due to the collective bargaining concerning work flexibility (hours, job contents, and workplace) but also the fact that employers want to reinforce their management power so as to expand, in particular, geographic and professional mobility.

The litigations caused by these clauses have then led the jurisprudence to limit them by opposing the principle of respect for individual liberties. In turn, this limitation has made jurisprudential criteria less strict on this matter and has given more interpretation power to judges. This evolution makes their decisions more difficult to predict and hence reduces legal certainty. Such a dynamic shows that the complexity of law largely criticized in France by the *de Virville Report* (2004), can be the result of its strategic use and lead to the loss of its regulatory power.

This use of flexibility clauses in the drafting of contracts, or any clause favoring the dismissal of the employee is all the more current, as the employee has less individual and collective bargaining power in the labor market (Bessy and Szpiro 2011). With this strategic use of law, the employment relationship is largely marked by relations of power. Furthermore, this weak position can, in turn, explain the fact that the opportunities for individual enforcement of contractual rights have been far and few between, particularly when the employee does not have the support of trade unions.

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<sup>13</sup> Indeed, there was a change in judicial precedents in the late eighties and early nineties concerning amendments to the employment contract. The employer's power is now limited insofar as any amendment to an essential element in the employment contract has to be explicitly approved by the employee (Waquet 1999). Aiming to protect employees, legal precedents reaffirm the contract mechanism and the value of initial commitments in an economic configuration nonetheless marked by a strong demand for flexibility in the employment relationship. So this new rationale leads to a contract with renegotiation until either there is a mutual agreement to modify terms or the contract is properly terminated. There is a major difference with the US regime of employment at will, which does not require any renegotiation. In order to acquire some freedom of action, the French employers have sought to introduce explicit clauses of flexibility, thus making individual dismissal easier if the employee refuses their application.

This evolution of contractual practices which favor the individual dismissal of employees offers a less optimistic view of the role played by individual agreement, as this legalization processes risks profiting uniquely the employers by reinforcing their legal security.<sup>14</sup> In the absence of individual or collective bargaining power, the employees must accept very flexible employment conditions without any actual counterparts.

This degradation of employment conditions can also affect more skilled-employees that work in innovative companies (like start-ups in NTIC industry) and condemn them permanently to success by always reaching more ambitious objectives. Moreover, these employees can lose their freedom of work when the employers systematically multiply contractual guarantees that are designed to protect the firm's immaterial assets, often connected within pools of assets inaccessible to employees. Although these clauses have a large formal aspect and are scarcely mobilized (Bessy 2007), there is a strong asymmetry between the employer's freedom to undertake and the employees' freedom to work. This productive configuration, marked by the contractualization of the employment relationship, would bear witness to the loss of collective supports within the firms and more widely within the industry or the profession. The flexibility and reactivity constraints, proper to the functioning of 'firms networks' and a mode of organization by project (connectionist order of worth), hinder the grounding of new institutions supported by operations of social facts categorization (Boltanski and Chiapello 2007). This institutional deficit can increase the inequalities which are not compensated by the increase of social individual rights.

### 3.3 A New Political Regime

This contractualization process must be situated within a more political transformation and a new form of state intervention. Indeed, the EC's agenda as a socio-economic analysis of law takes into account the political and legal philosophy so as to examine the ideological questions and the emergence of the European law at the macro level.

Within this perspective, the 'revival of contract' goes into the whole society and constitutes more horizontal social links. We can sketch here at least two interpretations in order to characterize the emergence of a new political regime. The first interpretation is that labor law would be no more a governance device, and would become more and more procedural. A new political regime would emerge by relying on the procedure according to which decisions are taken and not on their substantial content, which would be the product of the actors' deliberative activity. Following the French philosopher Paul Ricoeur (1995),

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<sup>14</sup> This process may constitute an explaining factor of the increasing in dismissals for individual reasons relatively to dismissals for economic reasons, in France from 1992, see Pignoni and Zouary (2003).

one can wonder if this evolution of labor law would correspond to a new political regime in which sovereignty would no longer constitute the main political issue. The states (nations) would be overtaken by the reinforcement of regional identities and the development of supranational instances, in particular the European institutions which are in debate today.

The increasingly decentralized character of the new forms of collective bargaining illustrates well this view (Jobert 2007). We can quote the increase in company agreements concerning work time reduction, training, and definition and assessment of competencies. Furthermore, territorial entities are more and more considered as new spaces of consultation and negotiation between the stakeholders of the firms. This promotion of 'social dialogue' and of information and consultation arrangements with a procedural orientation is widely ensured by European Union law (2002 Directive concerning information and consultation at the collective level). To maintain a "pluralist space," the consultation is extended to new actors, new stake-holders, and minority groups which claim the recognition of their identity, with the risk of missing the actual interests at stake.

However, the contractualization of individual and collective employment relations can be interpreted by another political philosophy which grounded the fiction of contract used by the economists. The latter consider a contract between equal parties as a set of incentive rules which acquire authority because they are the product of pure rational beings limiting their liberty while preserving their interests. Following this perspective, the more the individual agreements correspond to a balance between divergent interests, the more they will be self-enforcing.<sup>15</sup> This contractual approach of law relies on the predominance of "subjective rights" guaranteeing liberties and interests of individuals. In this approach, all legislative intervention is questioned because it risks disturbing the consensus between the individuals.<sup>16</sup>

One moves closer to the British political regime, which establishes a distinction between the spontaneous activities of the civil society and the limited responsibilities of the state.<sup>17</sup> The negotiation based on well-understood interests of each other constitutes a self-regulation answering the freely consented necessity to live in society. The negotiation process cannot be imposed by the government contrary to the precedent political regime which, failing to struggle

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<sup>15</sup> The recourse to 'transaction' as a contractual device of the employment contract breach gives a good illustration. On this issue, see the PhD work of Melot (2003). In particular, the author shows that transactions have increased since 1996 in France. Moreover, this kind of contractual breach spreads to all the employees and constitutes a substitute to collective dismissals in the frame of firms' restructurings.

<sup>16</sup> On this issue see the analysis of de Descombes (2004) dedicated to the criticism of individualist philosophy.

<sup>17</sup> Notice that the rise of deregulatory policies in the 1980s and early 1990s, undermining collective bargaining, has nonetheless sought to strengthen competition and the use of contractual devices into different industries and labour markets, including public sector.

against inequalities via substantial social measures, stipulates obligations to negotiate, to inform and to consult for the different stakeholders of the firms.

The analysis of these political regimes must go further and associate the different conceptions of the “legislation” and the “contract” (Supiot 2003).<sup>18</sup> They both ground the construction of European institutions by reducing the traditional prerogatives of the state-nation, in particular its social justice policy, and by defining “fundamental social rights” whose information and consultation rights make part. The decline of the notion of “employment status,” defined collectively and recognizing the hierarchical relationship between the employer and the employee, is risky when the latter has few bargaining power into the labor market. The protections supplied by the defense of individual liberties play a limited role and do not counterbalance the absence of pre-defined collective guarantees. By mobilizing the spirit of “contractual solidarism,” an author like Jamin (2001) thinks that it is dangerous to confuse the “contract” with the contractualist philosophy when the parties have unequal powers. The fundamental social principles are not sufficient to fully protect the workers. They only constitute a minimalist protection inspired by the “liberal discourse and its humanitarian backfires” (Jamin 2001, 470).

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#### 4. Conclusion

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EC defends an endogenous conception of law which can be deployed in regard of different scales of time so as to apprehend the pragmatic-historical nexus of law and conventions. We have presented different dynamics between both without the drawing of causal relations because of the plurality of conventions. These dynamics give place to the activities of “intermediaries of law” (in particular lawyers) which define models of compliance with legal rules and which connect different kind of norms, without avoiding the risk of falling into formalism and strategic use of law, which are source of unfairness and economic inefficiency.

The same kind of analysis has also been developed concerning the matter of intellectual property rights, a domain in which the strategic uses of law are as important as the huge monetary sums that are at stake (Bessy 2006). The increasing stakes relative to intellectual property rights litigation reflect overinvestment in legal resources and their instrumentalization, with the result that

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<sup>18</sup> The reflection followed by Supiot in this paper overtakes the distinction between ‘legislation’ and ‘contract’ in order to take into account the emergence of new conceptions both of the law (legislative power whose one part is transferred to the social partners) and of the contract which, in the absence of contractual liberty, becomes an enslavement device. The author underlines that this enslavement is likely to concern, not only, the employees, but all the actors, including public administration, via a set of norms and indicators who condition their behavior.

instead of being a source of security, the law in this area has become a force for uncertainty, criticized for its social and economic inefficiency. This uncertainty is reinforced by the multiplicity and complexity of regulations (international treaties and directives, national laws, and private standards of regulation) as it is also appearing in labor law.

The topic of intermediaries of law needs to be grounded because their activities have shown important evolutionary changes. Indeed, the construction of the European internal market endangers the “quality” of the performances of legal service, maybe the quality of law if the ongoing process of liberalization is driven to its extreme (Bessy 2012b).

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